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Capital Jurors as the Litmus Test of Community Conscience for the Juvenile Death Penalty

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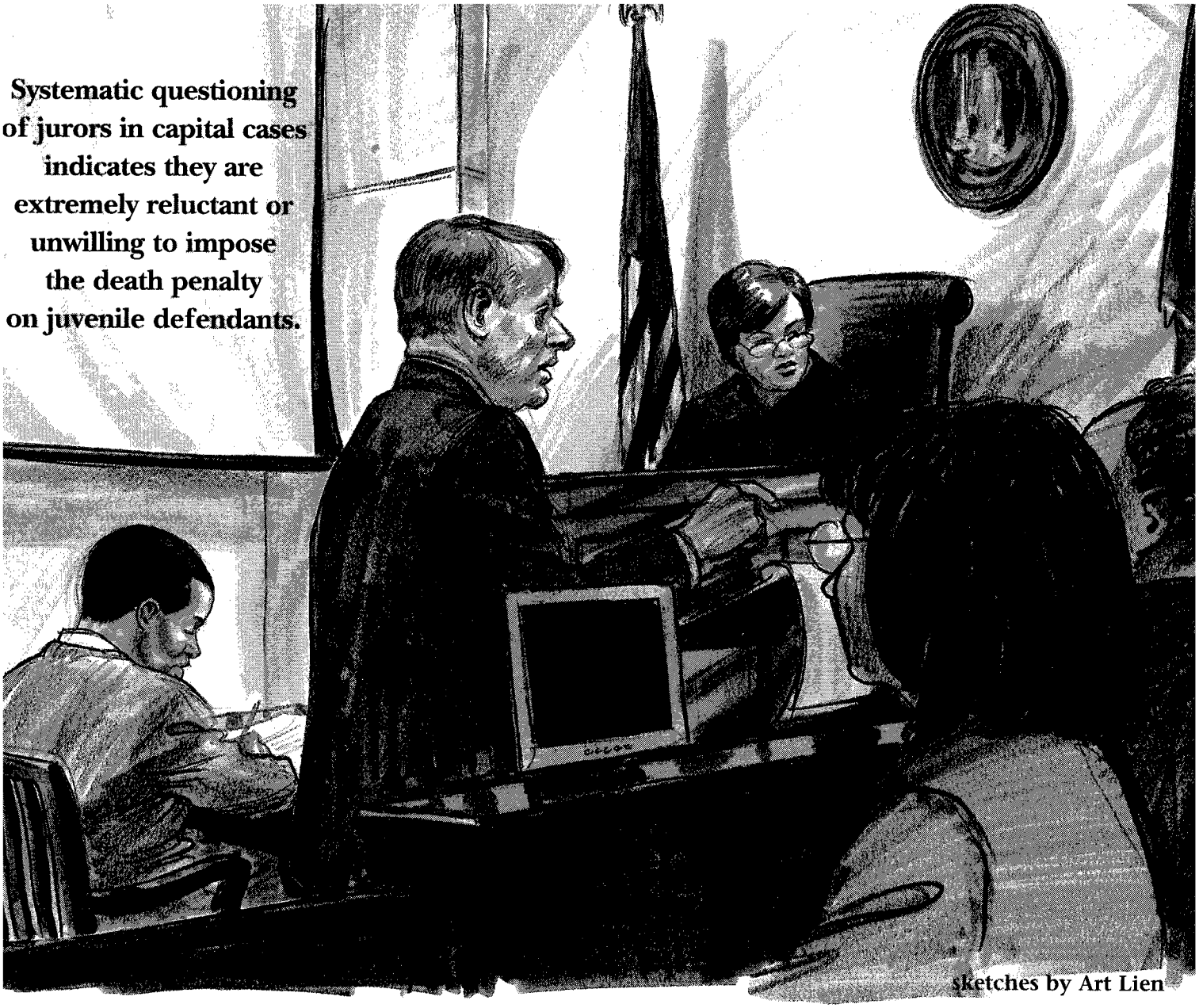
Systematic questioning of jurors in capital cases indicates they are extremely reluctant or unwilling to impose the death penalty on juvenile defendants.



sketches by Art Lien

Capital jurors as the litmus test of community CONSCIENCE FOR THE JUVENILE DEATH PENALTY

by Michael E. Antonio, Benjamin D. Fleury-Steiner, Valerie P. Hans, and William J. Bowers

This fall, the United States Supreme Court will consider the constitutionality of the juvenile death penalty in *Simmons v. Roper*.[1] The Eighth Amendment issue before the Court in *Simmons* will be whether the juvenile death penalty accords with the conscience of the community. This article presents evidence that bears directly on the conscience of the community in juvenile capital cases as revealed through extensive in-depth interviews with jurors who made the critical life-or-death decision in such cases. The data come from the Capital Jury Project, a national study of the exercise of sentencing discretion in capital cases conducted with the support of the National Science Foundation.

On August 26, 2003, the Missouri Supreme Court declared in *Simmons v. Roper* that the execution of persons younger than 18 at the time of their crime violates

1. 112 S.W.3d 397, 399 (Mo. 2003) (en banc) (holding the juvenile death penalty unconstitutional), *cert. granted*, 72 U.S.L.W. 3310 (U.S. Jan. 26, 2004) (No. 03-633).

the Eighth and Fourteenth Amendments of the United States Constitution. Applying the U.S. Supreme Court's reasoning in *Atkins v. Virginia*,[2] which struck down the execution of the mentally retarded, the Missouri Supreme Court found that there was a national consensus against the death penalty for juveniles and ruled that juveniles could no longer be executed as a matter of federal constitutional law. In the court's words,

> ... a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since Stanford, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade. Accordingly, this court finds the Supreme Court would today hold such executions are prohibited by the Eighth and Fourteenth Amendments.

The U.S. Supreme Court twice refused to consider the constitutionality of the juvenile death penalty in the year since its *Atkins* ruling and prior to the Missouri court's *Simmons* decision. In the Court's denial of habeas corpus review in *In re Stanford*, however, four dissenting justices subscribed to the view that there appears to be a growing public consensus that the juvenile death penalty violates evolving standards of decency.[3] They pointed to parallels between community sentiments about the acceptability of the death penalty for mentally retarded offenders, now found to violate the Constitution, and such sentiments about acceptability of capital punishment for juvenile offenders. Their Eighth Amendment arguments rested on state legislative trends and declining public support. Conspicuously absent, however, was any assessment of the behavior of capital juries in juvenile cases.

Chief Justice Rehnquist's dissenting opinion in *Atkins* suggests that the decision-making behavior of capital jurors is fundamental to an Eighth Amendment determination of community conscience. Joined by Justices Scalia and Thomas, he argued that the actions of state legislatures and capital juries are the most appropriate indicators for determining the community's evolving standards of decency. In particular, he wrote that the behavior of capital juries:

> "is a significant and reliable objective index of contemporary values," because of the jury's intimate involvement in the case and its function of "maintaining a link between contemporary community values and the penal system."[4]

In accord with the concerns voiced by the dissenters in *Atkins*, this article reports recently developed evidence on the decision making of capital jurors.[5] It provides direct evidence on the exercise of sentencing discretion by persons who have served as jurors in juvenile capital cases—the people who bring the community conscience to bear in practice and who express community sentiment in their thinking and decision making.

The Capital Jury Project

The CJP is a national program of research on the decision making of capital jurors conducted by a consortium of university-based researchers with the support of the National Science Foundation. The findings of the CJP are based on in-depth interviews with persons who have actually served as jurors in capital trials.[6] The interviews chronicle the jurors' experiences and decision making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.

The CJP has interviewed capital jurors in 14 states. States were chosen to reflect the principal variations in guided discretion capital statutes.[7] Within each state, 20 to 30 capital trials were picked to represent both life and death sentencing outcomes. From each trial, a target sample of four jurors was systematically selected for in-depth individual interviews. Interviewing began in the summer of 1991.[8] The present CJP working sample includes 1,198 jurors from 353 capital trials in 14 states. These 14 states are responsible for 76 percent of the 3,503 persons on death row as of January 1, 2004,[9] and for 78 percent of the 909 persons

EXCESSIVE BAIL SHALL NOT BE REQUIRED, NOR EXCESSIVE FINES IMPOSED, NOR CRUEL AND UNUSUAL PUNISHMENTS INFLICTED.

Eighth Amendment of the Constitution of the United States

2. 536 U.S. 304, 321 (2002) (prohibiting the execution of mentally retarded criminals as excessive punishment).

3. *See In re Stanford*, 537 U.S. 968 304, 321 (2002) (prohibiting the execution of mentally retarded criminals as excessive punishment).

4. *Atkins*, *supra* n. 2, at 323-24 (citations omitted). Chief Justice Rehnquist added: "In my view, these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment."

5. A more extensive and detailed analysis of these data appear in William J. Bowers, Benjamin Fleury-Steiner, Valerie P. Hans, and Michael E. Antonio, *Too Young for the Death Penalty: An Empirical Examination of Community Conscience and the Juvenile Death Penalty from the Perspective of Capital Jurors*, 84 B.U. L. Rev. 609 (2004).

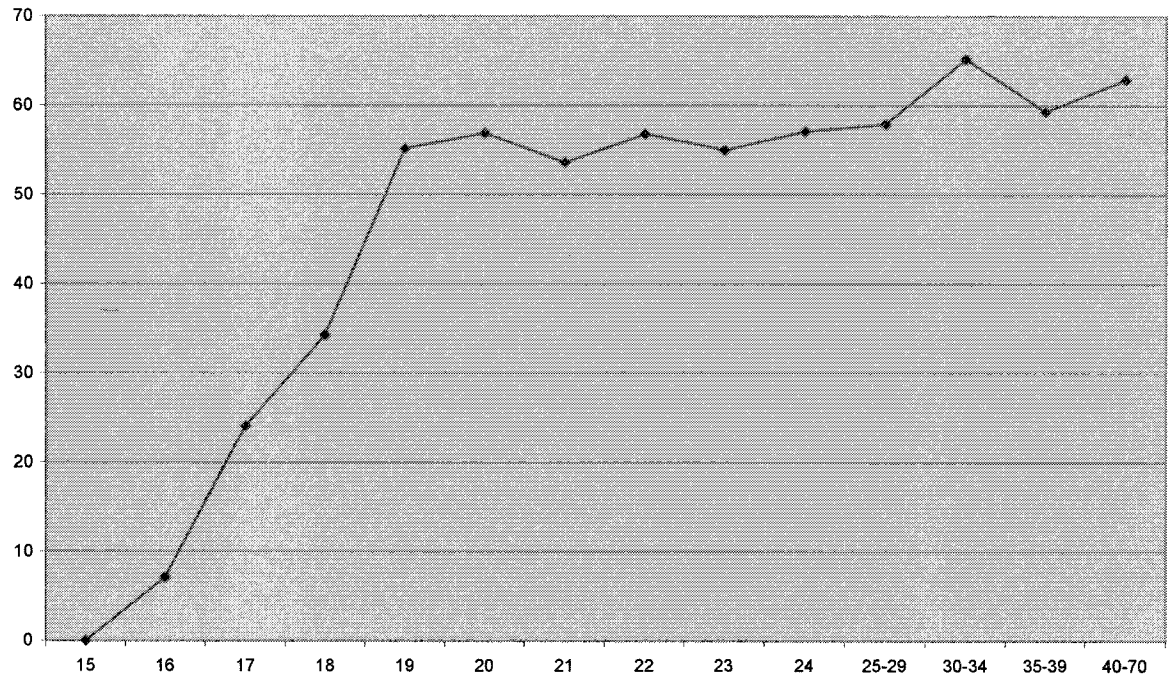
6. For further details of the sampling design and data collection procedures, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043, 1080 nn.200-03 (1995).

7. *Id.* at 1077-79 (supplying further details about sampling states).

8. Most interviews were conducted in the period 1991-1994, during which time interviewing was undertaken in the original eight sample states and four additional states that were added to enhance sample coverage. Interviewing continued until 1999 in two additional states that subsequently joined the CJP and in selected states to extend sample coverage or improve sample representativeness. *See* Bowers, *supra* n. 6.

9. *See* NAACP Legal Defense and Educational Fund, Inc., "Death Row, U.S.A.," at www.deathpenaltyinfo.org/article.php?scid=9&did=188#state (last visited April 28, 2004).

FIGURE 1: PERCENTAGE OF JURORS WHO GAVE THE DEATH PENALTY BY THEIR REPORTS OF THE DEFENDANT'S AGE



executed between 1977 and April 26, 2004.[10]

Drawing the line

The death penalty is rare for juvenile offenders. Nationally, persons who were less than 18 at the time of their crime comprise only 2 percent of death row inmates and the same percent of those who have been executed.[11] The defendant was a juvenile in 12 of the 353 capital trials in which the CJP has interviewed jurors, or 2.9 percent of all cases in the CJP sample. Altogether, 1,198 capital jurors were interviewed by CJP investigators; 48 served on cases with a juvenile defendant. Moreover, jurors imposed the death penalty in only 16.7 percent of the juvenile cases in our sample (2 of 12), as compared to 60 percent of the adult cases. This substantial difference of more than 40 percentage points in the imposition of the death penalty certainly suggests that jurors think differently about juvenile than they do about adult defendants.[12]

We consider two issues of direct legal relevance to death as punishment for youthful defendants. One is where the age line should be drawn between those who are eligible and those who are ineligible for capital punishment. The U.S. Supreme Court has drawn that line between 15 and 16 year olds in *Thompson v. Oklahoma* (1989) and *Stanford v. Kentucky* (1989). The other is whether the sentencing behavior of jurors in juvenile cases is comparable to that of jurors in cases of the mentally retarded, where *Atkins* has exempted

10. *Id.* at www.deathpenaltyinfo.org/article.php?scid=8&did=186.

11. *See* Victor L. Streib, THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, January 1, 1973–March 15, 2004, at 11-12 tbl.6, available at www.law.onu.edu/faculty/streib/JuvDeathMar152004.pdf (last modified Mar 16, 2004) (stating that the juveniles currently on death row constitute approximately 2% of the total death row population at 11).

12. Having a larger sample of jurors from more juvenile cases would be advantageous to the extent that it might enhance the diversity and representativeness of the cases and augment the statistical significance of differences between jurors in juvenile and adult cases. The 12 juvenile cases in the CJP sample are, however, regionally diverse and representative of juvenile cases on death row. They come from seven different states (two each from Alabama, Indiana, Kentucky, Texas, and Virginia and one each from Georgia and Pennsylvania). They are roughly comparable to death row in the percentage of African Americans; (33% in the CJP sample and 41% on death row). They are a little younger at offense than the juveniles on death row (33% in the CJP sample were less than 17 at offense compared to 19% on death row) (*see* Bowers et al., *supra* n. 5, at 12), as might be expected if jurors were less likely to impose a death sentence on younger juvenile defendants.

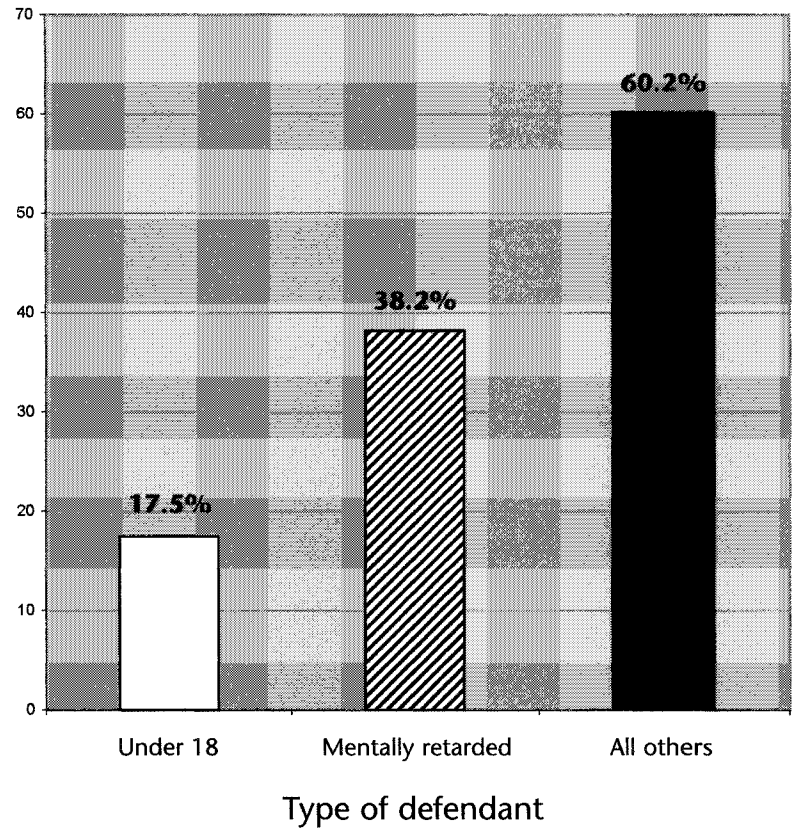
Since the number of jurors from juvenile cases in the CJP sample is not large, the differences we find between jurors in juvenile and adult cases need to be substantial to be statistically reliable indications of true differences between jurors in such cases, and since the sampling of jurors was clustered by trial, an alternative to the traditional Chi Square test of statistical independence is preferred. For this purpose, we have employed the STATA 8.0 software package that allows us to calculate an F statistic with an adjustment for the clustering of jurors by trial. (*See* StataCorp. 2003. Stata Statistical Software: Release 8.0. College Station, Texas: Stata Corporation, Stata Survey Data: Reference Manual Release 8.0, pg. 73).

defendants from the death penalty.

Age. Is there a sharp break between juvenile and adult defendants in reluctance to impose the death sentence, or does reluctance become progressively stronger with each step down the age ladder? To address this question, we looked at the death sentencing of defendants of specific ages as reported by the CJP jurors.[13] Figure 1 shows the percentage of jurors who imposed a death sentence according to the defendant's age (year-by-year for ages 15 through 24, in five year intervals from 25 through 39, and for all defendants 40 years or older).

Death sentencing is remarkably constant by age for defendants 19 through 24 and only slightly more common among older defendants. It drops decisively, however, at age 18 and again at 17 and younger from the relatively constant level for defendants of more advanced ages. The drop is 20.9 percentage points from ages 19 to 18 and another 16.9 points from age 18 to 17 or younger.[14] In other words, there is a precipitous drop in the likelihood of a death sentence for youthful defendants, but it does not coincide precisely with the difference between 18 and 17 year olds, where the legal line is traditionally drawn between juveniles and adults. It begins instead with defendants whom jurors believe to be age 18. In effect, 18-year-old defendants are midway between the uniformly high death sentencing percentage of 59.6 percent for defendants presumed to be 19 and older and the very low level of 17.4 percent for those perceived to be 17 and younger. It would seem that jurors see as many as half of the defendants aged 18 in much the same light as younger defendants, whom they are very likely to spare.[15]

FIGURE 2: PERCENTAGE OF JURORS WHO GAVE DEATH PENALTY TO DEFENDANTS WHO WERE UNDER 18, MENTALLY RETARDED, AND ALL OTHERS



Mental retardation. Are jurors as likely to impose a death sentence when the defendant is a juvenile as when he or she is mentally retarded? The interview protocol included a question that asked jurors whether the defendant in their case was mentally retarded and another that asked whether he or she was under 18 at the time of the crime.[16] The percentage of jurors who imposed a death sentence when they believed the defendant was under 18 and when they believed the defendant was mentally retarded are shown in Figure 2.

Juvenile status is far more likely than mental retardation to keep capital jurors from sentencing a defendant to death. The drop in death sentencing in juvenile cases is more than twice that in cases of the mentally retarded. In particular, the level of death sentencing in cases where jurors said the defendant was less than 18 at the time of the crime (17.5 percent) is less than half the level among jurors who said the defendant was mentally retarded (38.2 percent). The drop in death sentencing is 42.7 percentage points when the defendant was a juvenile (60.2 percent vs. 17.5 percent) as compared to 22 points when the defendant was mentally retarded

13. Jurors' estimates are, of course, imperfect proxies for true chronological age. Whereas 46 jurors estimated that the defendant was 15, 16, or 17 years of age, there were 48 jurors in the 12 confirmed juvenile cases.

14. The 25.3 percentage-point death sentencing drop of those estimating 18 years old from those who say 19 or older is statistically significant at p = .0114; the 42.2 point drop of those who say 17 or younger from those saying 19 or older is significant at p = .0008.

15. *See* Alex Kotlowitz, *In the Face of Death*, N. Y. Times Magazine, July 6, 2003, at 32 (for a journalistic account of jurors' responses to an 18-year-old capital defendant).

16. The question asked about "factors that were true or present in a murder case." One factor read "the defendant was mentally retarded" and another factor read "the defendant was under 18 at the time of the crime."

(60.2 vs. 38.2 percent).[17] In other words, the fact that the defendant was a juvenile carries twice the weight in reducing the likelihood of a death sentence among capital jurors than does the fact that the defendant was mentally retarded. The community conscience, as embodied in the thinking and sentencing decisions of capital jurors, evidently rejects the death penalty for juvenile defendants even more decisively than it does for the mentally retarded.

The community conscience

In this section, we draw upon jurors' responses to specific questions in the CJP interviews to learn how the cases of juvenile defendants differ from those of adult defendants, both objectively and in the minds of jurors. We then turn to jurors' narrative accounts of their decision making in juvenile cases for confirmation, refinement, and elaboration of the perspective on jurors' thinking about juvenile cases developed here.

The crime. Are the capital crimes for which juveniles are tried less serious or aggravated than those of adults? If so, this might account in some measure for the evidently greater reluctance of jurors to impose the death penalty in juvenile cases. To address this issue, we compared juvenile and adult cases in terms of objective indicators of the nature and seriousness of the crime and jurors' subjective perceptions or feelings about the crime. These comparisons show that the much greater reluctance of jurors to impose death sentences in juvenile than in adult cases is not due to differences in the crimes juveniles commit or in jurors' perceptions of these crimes. If anything, the juvenile cases are slightly more aggravated, at least in the number of persons killed and in the bloody and gory nature of the killing.[18]

The defendant. Do jurors think differently about juvenile than they do about adult defendants? During the interview, jurors were asked about their perceptions of the defendant. One question presented them with 23 words or phrases and asked how well each described the defendant. Five of the six descriptions that distinguish significantly between juvenile and adults defendants appear in Table 1.[19] They have been grouped into two panels according to their substantive reference: family background factors (Panel A) and social adjustment factors (Panel B).[20]

TABLE 1: JURORS' CHARACTERIZATION OF THE DEFENDANT'S FAMILY BACKGROUND AND SOCIAL ADJUSTMENT FACTORS IN JUVENILE AND ADULT CASES[a]

In your mind, how well do the following words describe the defendant?

	Response category	Juvenile cases	Adult cases	p[b]
Panel A : Family background factors				
Raised in a warm loving home	Not at all	72.7%	34.5%	***
From poor or deprived background	Very well	54.2%	35.8%	**
Has gotten a raw deal in life	Very/fairly well	43.7%	25.7%	**
Panel B: Social adjustment factors				
Doesn't know place in society	Very well	58.7%	31.7%	***
Lacks basic human instincts	Very/fairly well	62.6%	46.5%	**

a. Percentages are based on 39 to 48 jurors in juvenile cases and 954 to 1,120 jurors in adult cases.
b. Probability levels ** $p < .05$, *** $p < .01$, computed with adjustment for clustering of jurors by trial.

Family background. The statement "raised in a warm, loving home" distinguishes between juvenile and adult defendants more than any of the other defendant characterizations. Jurors in juvenile cases were far more likely than those in adult cases to say it was "not at all" true that the defendant was raised in a "warm, loving home." The percentage difference reaches almost 40 points (72.7 vs. 34.5 percent), more than a two-to-one ratio. This decisive absence of a warm, loving home among juvenile defendants is accompanied by other apparently family-related differences, such as being from "a poor or deprived background" and having "gotten a raw deal in life." In these latter two respects, juvenile defendants are nearly 20 percentage points more disadvantaged than adult defendants in the minds of the jurors. Together, these characterizations cast the juvenile defendant as someone relatively deprived of a family context that provides necessary socialization for responsible participation in adult society.

Social adjustment. The difference in social adjustment is reflected foremost in the statement "doesn't know his place in society." Many more jurors in the juvenile cases said this characterized the defendant "very well." The difference between jurors' characterization of juvenile and adult defendants here is 27.0 percentage points (58.7 vs. 31.7 percent)—again, an almost two-to-one ratio. Also more common in juvenile cases (by 16.1 points) is the perception that the defendant "lacks basic human instincts." This is a stark fore-

17. The death sentencing drop owing to juvenile status is significant at $p = .0001$ as compared to $p = .0154$ for the drop owing to mental retardation.

18. *See* Bowers et al., *supra* n. 5, at tables 2-3.

19. For all comparisons in Tables 1-3 the variables are dichotomized at the point that maximizes the percentage difference between jurors in juvenile and adult cases. This standardizes the comparisons of variables and economizes in the presentation of statistical data. All differences in these tables are significant beyond the .10 probability level. Significance levels are adjusted for the clustering of jurors by trial (*see* n. 12).

20. The significant difference omitted from Table 1 pertains to alcoholism, which is more common to adult defendants and may tend to mitigate the crime. For the juvenile–adult difference in alcoholism, *see* Bowers, et al., *supra* n. 5, at Table 4, panel C.

It is the juvenile defendant's family, far more than the defendant himself, who provoked distinctive feelings and reactions among jurors in juvenile cases.

boding of social maladjustment and certainly one reason for a juror to believe the defendant "doesn't know his place in society." It would likely serve as aggravation for an adult defendant, but may well be mitigation for a juvenile.

Defendant's family background

Additional interview questions permitted us to follow up on jurors' observations, impressions, and feelings about the defendant's family background and social adjustment. The questioning moved from jurors' characterizations of the defendant to their feelings about the defendant and his family. First, jurors were asked, "Did you have any of the following thoughts or feelings about the defendant?" They could respond "yes" or "no" to each of eight descriptions of thoughts or feelings.

Jurors in juvenile and adult cases differed significantly in only one respect (Table 2, Panel A). Two-thirds of the jurors in juvenile cases (66.7 percent) said they had "pity or sympathy for the defendant," as compared to about half of the jurors (51.5 percent) in adult cases (a difference of 15.2 points). It appears that the juvenile defendant's disadvantaged and dysfunctional family background more often translates into feelings of pity and sympathy among jurors.

It is the juvenile defendant's family, far more than the defendant himself, who provoked distinctive feelings and reactions among jurors

TABLE 2: JURORS' FEELINGS ABOUT THE DEFENDANT AND THE DEFENDANT'S FAMILY IN JUVENILE AND ADULT CASES[a]

	Response category	Juvenile cases	Adult cases	p[b]
Panel A: Jurors' feelings about the defendant				
Did you have the following thoughts or feelings about the defendant?				
Felt pity or sympathy for defendant	Yes	66.7%	51.5%	*
Panel B: Jurors' feelings about the defendant's family				
Whether or not they came to the trial, did you have any of the following thoughts or feelings about the defendant's family?				
Felt anger or rage toward them	Yes	34.0%	10.1%	***
Felt contempt or hatred for them	Yes	19.6%	5.2%	***
They seemed very different from your own family	Yes	80.9%	58.5%	**
Imagined yourself in their situation	Yes	27.7%	47.3%	***

a. Percentages are based on 47 jurors in juvenile cases and 1121 to 1146 jurors in adult cases.
b. Probability levels * $p < .10$, ** $p < .05$, *** $p < .01$, computed with adjustment for clustering of jurors by trial.

in juvenile cases, and these feelings were quite the contrary of pity or sympathy. Like the question about feelings toward the defendant, jurors were asked, "Did you have any of the following thoughts or feelings about the defendant's family?" (Panel B).

Far more jurors in juvenile than in adult cases said they felt anger or rage toward the defendant's family (a more than three to one difference of 23.9 points). More jurors in juvenile cases also said they had feelings of "contempt or hatred" for the defendant's family (by 14.4 points). In accord with their greater anger, rage, contempt, or hatred toward the defendant's family, jurors in juvenile cases also tended to distance themselves psychologically from the family. Jurors in these cases were more likely to see the juvenile's family as "very different from their own family," and they were less able to "imagine [themselves] in [the defendant's family's situation" (differences of 22.4 and 19.6 points, respectively).

The absence of a loving family, so prominent in jurors' characterizations of juvenile defendants (Table 1, Panel A), is echoed here in jurors' feelings of anger or rage toward that family. Evidently, the family's failure to provide a minimum of love or nurturance to the defendant when growing up provokes jurors' anger or rage. They appear to hold the family responsible in some measure for his crime.

Defendant's social adjustment

Of course, the impressions jurors have of the defendant are a product of the evidence adduced in court and his testimony if he takes the stand. But beyond that, their impressions will be influenced by his appearance, manner, and demeanor in the courtroom and by how others relate to him. Both the verbal and nonverbal cues jurors pick up on can be a potent indication to them of who the defendant is, especially the degree to which he is an immature individual who has yet to learn his place in society. Jurors' responses to questions about the defendant's appearance in court and about other aspects of his demeanor appear in Table 3.

TABLE 3: JURORS' DESCRIPTIONS OF THE DEFENDANT'S APPEARANCE IN COURT AND OTHER DEMEANOR-RELATED FACTORS IN JUVENILE AND ADULT CASES[a]

	Response category	Juvenile cases	Adult cases	p[b]
Panel A: Defendant's appearance in court				
How did the defendant appear to you during the trial?				
Spruced up to make a good appearance	Yes	26.1%	60.9%	***
Self-confident	Yes	30.4%	49.0%	**
Bored (i.e., indifferent, remote)	Yes	66.0%	51.0%	*
Panel B: Other demeanor-related factors				
What did defendant usually wear in court?				
Casual clothes		72.9%	47.5%	**
How did the defense attorney(s) treat the defendant?				
Close relationship		27.9%	46.0%	**
Did the defendant's mood or attitude change after the guilty verdict and the focus of the trial shifted to what the punishment should be?	Yes	10.4%	29.3%	***
Did the defendant testify or make a statement at the punishment stage of the trial?	Yes	6.4%	29.5%	***

a. Percentages are based on 43 to 48 jurors in juvenile cases and 1081 to 1137 jurors in adult cases.
b. Probability levels * $p < .10$, ** $p < .05$, *** $p < .01$, computed with adjustment for clustering of jurors by trial.

Jurors were asked, "How did the defendant appear to you during the trial?" They could respond "yes" or "no" to eight words or phrases. The three responses that distinguish jurors in the juvenile from those in the adult cases are shown in Panel A. Jurors in the juvenile cases see the defendant as conspicuously failing to be "spruced up" to make a good appearance, lacking in self-confidence, and bored (i.e., indifferent, remote). The failure to be spruced up to make a good appearance when on trial for one's life is responsible for a 34-point difference between juvenile and adult defendants (26.1 vs. 60.9 percent). The juvenile-adult differences in appearing self-confident and bored are 18.6 and 15.0 points, respectively. These differences would appear to signal immaturity in terms of a failure to understand the seriousness of his situation or to appreciate the impression he is making on other people. These are perceptions that might tend to condemn an adult defendant, but excuse a juvenile.

The failure to make a good appearance in these ways is symptomatic of other unfavorable aspects of courtroom demeanor (Table 3, Panel B). For instance, jurors reported that juvenile defendants were much more likely than adult defendants (by 25.4 points) to wear casual clothes rather than a suit at the trial. They were also less likely to say (by 18.1 points) that "his attorney(s) seemed to have a close working relationship with the defendant as part of the defense team." In effect, the juvenile defendant, relative to his adult counterpart, did not act like or get treated like a mature, responsible individual in the courtroom.

A further difference reflecting the failure of the juvenile defendant to understand or appreciate the situation in which he was thrust was jurors' perceptions of his response to the capital murder conviction. Only a third as many jurors in juvenile as compared to adult cases (10.4 vs. 29.3) indicated that "the defendant's mood or attitude changed after the guilty verdict was handed down and the focus of the trial shifted to what the punishment should be."

This apparent indifference to being convicted of capital murder may be reinforced by juvenile defendants being less likely to testify on their own behalf at the sentencing stage of the trial. While they were slightly more likely than adult defendants to testify at the guilt stage (36.2 vs. 30.8 percent),[21] they were decidedly less likely than their adult counterparts to do so at the penalty stage of the trial (6.4 vs. 29.5 percent). This suggests that the defense attorney believed that the defendant's appearance on the stand at this stage of the trial would make an unfavorable impression.

What jurors come to regard as the juvenile defendant's failure to know his place in society or to exhibit basic human instincts (Table 1, Panel B) might be inferred from what they learn during the trial about his crime and the circumstances that led up to it. But in the courtroom they will be directly confronted with the social incapacities and signs of immaturity that juvenile defendants more often exhibit. These include conspicuously failing to make a good appearance, acting bored (i.e., indifferent, remote), dressing informally, and being remote from their attorneys. Perhaps the crowning impropriety is the apparent indifference of many more juvenile than adult defendants to the jury's capital murder verdict. These are signs that the juvenile defendant is out of touch with adult concerns, that he fails to understand or appreciate the seriousness of his situation, and that he may be oriented to peer rather than adult realities. Moreover, these peculiarities call the defendant's cognitive development and social maturation into question. They raise doubts about the defendant's capacity to participate effectively in his own defense.

21. Not shown in Table 3 because the difference is not statistically significant.

Juror narratives

The lengthy CJP interviews were tape recorded with jurors' permission, and have been transcribed for analysis. Here we have drawn upon some of the extensive narrative accounts jurors provided in response to open-ended questions and to structured questions with limited response options when they felt moved to explain or elaborate their responses.

First, we present jurors' accounts from several cases where the jury voted for a life sentence and the trial judge imposed that sentence. This will serve to explicate the themes common to jurors' thinking in these cases in the language they used to express their thinking and feelings. Second, we examine jurors' narratives in the two cases in which they imposed the death penalty. Here we ask the questions: Under what conditions do jurors make exceptions to the prevailing pattern? Are these "exceptions that prove the rule?"

When juries reject the death penalty for juvenile defendants. While these interviews dealt with different defendants and crimes, nearly all of the jurors described the juvenile defendant's overwhelmingly dysfunctional home life and immaturity as reason for sparing him the death penalty. In particular, jurors from these cases described the defendant as lacking positive role models and never being taught social norms of proper behavior. Many jurors said these deficiencies in childhood socialization are why he committed the crime and thus why they did not support the death penalty in his case. A juror from an Indiana case remarked about the defendant's dysfunctional home life and school experience, and how these factors led to a feeling of deep sympathy for the defendant:

> There were all kinds of thoughts and feelings about him throughout the trial. My mind changed back and forth several times. I just felt sorry for him. They talked about his home life and his stuttering and kids making fun of him at school... They talked about his mom and dad not caring for him... I figured he just needed a little loving like all kids do.

The next two juror narratives come from a Georgia case. When asked how well the statement "raised in a warm, loving home" described the defendant, the first juror responded "not at all" and added: "I don't think this child had any structuring or nurturing at all." Her response to another descriptive phrase, "a good person who got off on the wrong foot," gives further perspective on her view of the defendant: "no ... I think this kid just never had a chance, was never taught, I don't think he was ever a good person, period. I don't think he was ever taught what is good, what is bad. He was never taught that by anyone in authority."

After responding to words that might describe the defendant, jurors were invited to add further observations about the defendant. At this point, this juror noted

> he was like...a little ball. They go from place to place, they just bounce around. But they don't belong anywhere or any place. This person has him for a while, that person has him for a while, they go to a foster home for a while. I believe that was what he endured most as a child—severe neglect...

A second juror commented on the defendant's upbringing and family. When asked "what the jury did to reach its decision about defendant's punishment," the juror answered:

> [We] did not want to give him the death penalty—basically because of, ya know, his environment, the way he'd been raised, his lifestyle, he was very . . . Ya know, he was, he was just, he was very, very immature for his age. He- he was just not very intelligent. What he did was horrible and he - he should never be on the street again, . . . I had, you know, I—I've been raised in a, in a good environment, I know right from wrong. [He's] been raised like an animal, you know, basically he was raised like an animal. He was out for survival

and he had, you know, he just—I don't know. It's sad.

The juror was then asked, "Can you think of anything more we haven't talked about yet that was important in understanding the jury's punishment decision?" The juror responded, "the age. We haven't really said anything about his age. I mean, he was so young, ya know, ya [juror sighs] even, yeah, that had an effect, ya know, he was a very young boy. [Inaud.] That had a lot to do with it."

The defendant's age also strongly influenced capital jurors serving on a case in Alabama. When asked what the most important factor in the jury's decision was, one juror succinctly responded that "he was too young for the death penalty." In fact, the defendant's age provoked some jurors to consider not finding the defendant guilty of capital murder. A juror indicated that "a couple of jurors did not want to find him guilty because they were hesitant to either give him the death penalty or life without parole because of his age." Another juror put it differently: "some of the jurors knew that he was guilty but were trying to find a loophole to find him not guilty because of his age."

When juries vote for death in juvenile cases. Although jurors are far more likely to spare the lives of juvenile than of adult defendants, they did impose death sentences upon 2 of the 12 juvenile defendants in the CJP cases. The obvious question is, what led jurors in these two cases to depart from the prevailing tendency and impose a death sentence instead?

At least for one of these cases, tried in Virginia, the simplest answer appears to be that jurors did not think of the defendant as a juvenile. Instead, he was seen as an adult, indeed a frightening adult. The defendant was nearing 21 years of age by the time of his trial. He was physically imposing. At 11 years old he was over six feet tall. Perhaps his racial identity as an African American also played a role. When asked to describe the defendant, one juror responded that he was "a very large black man." Another juror identified the defendant with someone he knew in a way that made race explicit and emphasized his physical size. When asked, "Did (the defendant) remind you of someone or make you think about anyone? If so, who? Describe the person," this juror explained the likeness: "Only because this guy was a tall, pretty muscular black guy with, this is just gonna be what it is, with big feet. And big feet meaning, because he was a big boy."

Could jurors' reactions to the defendant's physical size, race, and age at trial, the fact that they saw him as "large" and "black" and a "man," have numbed them to the reality that he was a juvenile at the time of the crime? Were they less ready to see him as a "youth," less likely to think of him as similar to juveniles they know? Did his size, race, and age at trial make them less receptive to arguments that his poor family upbringing was responsible in some measure for his crime, more inclined to interpret his courtroom conduct as sullen, surly, and frightening rather than immature or out of touch with the courtroom context?[22] Several jurors described him as utterly emotionless, despite other jurors' reports of his tears at the mention of his murdered brother and after his mother's appearance on the stand. Did his tears fail to register sympathy because his appearance and demeanor in court fit their image of an adult, African American predator?

Juror narratives from the other juvenile case, from Pennsylvania, that resulted in death indicated that the African American defendant had a dysfunctional family and disadvantaged upbringing and that he was inappropriately hostile or menacing in court. One juror felt pity or sympathy for him because of "the way he was raised." This juror noted that she "tried to figure out what made him do what he did—his environment, his upbringing. His mother lived in that house and also was involved in drugs." Another juror commented on the defendant's family, remarking that "their standards were psychopathic in a sense in a different culture, not ambitious, mother was probably indifferent."

His courtroom demeanor seemed to have alienated his jurors, several of whom did not think of him as a juvenile who was younger than 18 at the time of the crime. The first juror mentioned that she and the other jurors felt disconnected from him, "when you're a juror, it is said that the jury is a group of your peers; we were not his peers. . . . Raised in this atmosphere, no one could really walk in his shoes or know that lifestyle." His jurors also commented on what they saw as his inappropriate demeanor in the courtroom. One juror observed that he appeared "angry [and] spent time glaring at the jury."

Additionally, jurors in each of these two cases became convinced, mistakenly it would seem, that the law, or judge's instructions, required them to impose a death sentence.[23] When a juror in the first death case was asked what she remembered about the judge's instructions to the jury for deciding what the punishment should be, she answered, "there was something in the instructions that said, if this is the case, you have no choice, but to decide on death as punishment." When the interviewer probed, "So without those instructions in front of you . . .," she responded, "[mumbling] I probably wouldn't have voted that way."

Responding to a question about what most influenced her punishment decision, a juror in the second case said, "[the] judge's instructions." This juror added that she was "uncomfortable with it, [but] knew [they] had to follow the letter of the

22. *See* William J. Bowers, Benjamin D. Steiner, and Marla Sandys. *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001), for extensive comparisons of the different perspectives of white and African American jurors exposed to the same evidence in the same African American defendant/white victim cases, esp. Tables 3-5 and accompanying text.

23. Apparently contrary to the Supreme Court's holding that the death penalty is never mandatory upon a capital conviction, see *Woodson v. North Carolina*, 428 U.S. 280 (1976).

law." An interviewer's note on another juror's completed interview instrument read, "this respondent described being 'caught' because of feeling that she had sworn to uphold and follow the law."

Like the jurors who voted for life, the jurors in these two death cases saw the defendant as seriously deprived of a functional family environment. Yet the ameliorating influence of this circumstance appears to have been trumped in their minds by the defendant's adult appearance in court (and possibly his race) and by their likely false impression that the law "required" them to impose death in these cases.

Implications

At what age are defendants too young to be executed? The answer lies in the "conscience of the community," according to the U.S. Supreme Court. Arguably, the community's conscience is best reflected in the thinking and decision making of those members of the community who are called upon to bring that conscience to bear in making the life or death sentencing decision in juvenile cases. They are the representation and personification of the community—they provide a direct litmus test of the community conscience. To be sure, this is a conservative test unlikely to yield a "false positive," because "death qualification" purges community members who reject the death penalty for persons of any age from the capital jury's ranks.

If death-qualified capital jurors are markedly reluctant to impose the death penalty upon defendants at a given age, this is a reliable indication of the age at which defendants should be exempt from execution according to the community conscience. And if they are equally or even less willing to impose death upon defendants of that age than upon defendants who are exempt from execution on other grounds, such as mental retardation, this is further confirmation that the community conscience calls for the exemption of persons of that age from capital punishment.

The evidence from capital jurors is clear on these accounts. Jurors were drastically less likely to sentence defendants to death when their crimes were committed at ages 17 or younger. Death sentences are less than a third as likely for defendants who are 17 or younger than for those 19 or older.[24] Beyond this, defendants thought by jurors to be 17 or younger at the time of their crimes are only half as likely to receive a death sentence as those thought by jurors to be mentally retarded. This makes youngsters 17 or younger decidedly less likely to receive a death sentence than those now exempt from execution on the grounds that the conscience of the community makes their execution constitutionally unacceptable.

Furthermore, we have seen that jurors' thinking about the defendant is qualitatively different in juvenile cases. The statistical comparisons and narrative accounts reported in this article reflect two broad themes, one pertaining to the defendant's background and one to his foreground. The core of the background theme is family dysfunction and the ways in which jurors come to see the defendant's family as responsible in part for what led to his crime, hence for his crime itself. The core of the foreground theme is the defendant's immaturity, incapacity, and incompetence to be a fully responsible person in society. Both of these themes emphasize the juvenile defendant's diminished or only partial responsibility for his crime. These are the reasons, indeed matters of conscience, jurors gave for believing that the death penalty was not appropriate for the juvenile defendant in the case on which they served.

Although members of the U.S. Supreme Court have recognized the decisions of juries as an important indicator of community conscience in judging Eighth Amendment challenges to the death penalty, the Court has had to do without such evidence[25] or to settle for the indirect evidence of jury sentencing outcomes.[26] The absence of direct evidence is surely owing to a tendency for the decision making of juries to be insulated from scrutiny behind a veil of jury room secrecy. This research has lifted that veil in the interest of the truth about decision making in juvenile capital cases. It has exposed a strong connection between community sentiments and the rejection of the death penalty for juveniles. By looking beyond sentencing outcomes to the thinking of jurors as reflected in their responses to systematic questioning and in their unrestricted accounts and explanations of their decision making, we now see that they are extremely reluctant or unwilling to impose the death penalty on juvenile defendants.

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24. Moreover, as seen above, in the 2 of 12 juvenile cases where jurors did vote for death, their verdicts appear to have been flawed by the misconception that the death penalty was required by law.

25. In his *Atkins* dissent, Chief Justice Rehnquist opined, "In reaching its conclusion today, the Court does not take notice of the fact that neither petitioner nor his amici have adduced any comprehensive statistics that would conclusively prove (or disprove) whether juries routinely consider death a disproportionate punishment for mentally retarded offenders like petitioner."

26. *Id.* "In *Coker v. Georgia*, 433 U.S. 584, at 596-597, for example, we credited data showing that "at least 9 out of 10" juries in Georgia did not impose the death sentence for rape convictions (citation added)."